To: Throwe, Scott[Throwe.Scott@epa.gov]
From: McClintock, Katie
Sent: Wed 2/24/2016 3:38:14 AM
Subject: RE: Region 10 glass facility issue

That's great news. Thanks. I'll let my management know. I have been out the last two days so I haven't had a chance to talk to Julie Matthews about her thoughts yet. I'll let you know what happens next here.

From: Throwe, Scott
Sent: Tuesday, February 23, 2016 9:10 AM
To: McClintock, Katie <McClintock.Katie@epa.gov>
Cc: Yellin, Patrick <Yellin.Patrick@epa.gov>
Subject: RE: Region 10 glass facility issue

Ex. 5 - Deliberative Process

I'm happy to talk further.

Scott Throwe

U.S. EPA

Office of Enforcement and Compliance Assurance

Office of Compliance

Phone: 202-564-7013

From: McClintock, Katie
Sent: Tuesday, February 23, 2016 10:22 AM
To: Throwe, Scott <Throwe.Scott@epa.gov>
Subject: RE: Region 10 glass facility issue

I agree that I think the use of periodic in the response to comment gives us tons of strength. I don't know about all the rest of the docket stuff and how we would view that but the word periodic to me was a great word choice and is a great way to distinguish between these large stained glass folks and small art studios and universities.

Let me know how it goes with Ed.

From: Throwe, Scott
Sent: Tuesday, February 23, 2016 5:17 AM
To: McClintock, Katie <McClintock.Katie@epa.gov>
Subject: RE: Region 10 glass facility issue

Katie: I'm running Jon's issues by Ed Messina to get his take on this as well.

Ex. 5 - Deliberative Process

disagree)

Jon points to the following response to comment language:

we have revised § 63.11448 to specify that periodic or pot furnaces are not subject to the final Glass Manufacturing Area Source NESHAP. **We believe this revision will address most of the concerns of the stained glass manufacturing sector as well as other sectors and organizations, such as artisans, schools, studios, and other small facilities that produce glass using periodic furnaces."**

We stated that we were addressing the concerns at facilities using "periodic furnaces." It seems we can still make a strong case that the furnace in question is not operated periodically and is under continuous operation.

Your thoughts?

-

Scott Throwe

U.S. EPA

Office of Enforcement and Compliance Assurance

Office of Compliance

Phone: 202-564-7013

From: McClintock, Katie
Sent: Tuesday, February 23, 2016 12:54 AM
To: Averback, Jonathan <Averback.Jonathan@epa.gov>; Throwe, Scott <Throwe.Scott@epa.gov>
Cc: Narvaez, Madonna <Narvaez.Madonna@epa.gov>; Fairchild, Susan <Fairchild.Susan@epa.gov>; Yellin, Patrick <Yellin.Patrick@epa.gov>; Barnett, Keith <Barnett.Keith@epa.gov>; Rodman, Sonja <Rodman.Sonja@epa.gov>; Matthews, Julie <Matthews.Juliane@epa.gov>
Subject: RE: Region 10 glass facility issue

Jon –

Thank you for taking the time to walk through your thought process. That is very helpful for me. I am not sure the next steps on this, but I went ahead and noted a few answers to your questions below.

I also have one thought regarding "periodic" that I thought I'd share. After our conversation I read our response to comment and was encouraged by the definition of continuous as essentially being not periodic. The industry term of concern has to do with how glass goes in and out (continuous or batch) and does not refer to the frequency or continuity of operations. I actually thought the designation of periodic/continuous was really the relevant test from an environmental standpoint in terms of quantity of emissions from a furnace. To me there are two cut offs: 1) size of the furnace 2) frequency of operations. Clearly we don't want to capture

small furnaces or furnaces that aren't used in regular production (even if they are kept hot at all times). As you can see in my answer below, the operations we are talking about here are large and regular (6 days a week or more, 2/3 shifts). Small studios or universities would fall in this small/irregular group. I get the feeling that when we wrote the rule, we thought that spectrum/bullseye/uroboros were all in the small/irregular group. I'm curious whether if we drew the categories right but thought they were in a different box because of incomplete information, how that new information can change applicability (and I understand equity may be another issue). I won't pretend to be able to evaluate the docket and other arguments you make, but I wanted to share my view of the preamble use of "periodic" and the answers below for what it is worth.

Katie

Attorney-client communication/deliberative process – do not release

From: Averback, Jonathan
Sent: Monday, February 22, 2016 3:16 PM
To: Throwe, Scott <Throwe.Scott@epa.gov>
Cc: Narvaez, Madonna <Narvaez.Madonna@epa.gov>; McClintock, Katie <McClintock.Katie@epa.gov>; Fairchild, Susan <Fairchild.Susan@epa.gov>; Yellin, Patrick <Yellin.Patrick@epa.gov>; Barnett, Keith <Barnett.Keith@epa.gov>; Rodman, Sonja <Rodman.Sonja@epa.gov>; Matthews, Julie <Matthews.Juliane@epa.gov>
Subject: RE: Region 10 glass facility issue

Attorney Client communication / deliberative process – do not release

Thanks to all for pulling me in. I've looked at the final FR notice, the RTC, the log of communications, and the background document on the industry (Thanks Susan). Having considered the above, and the language of the rule, I would say that, while it is plausible to go forward and try to find the rule as applying to Bullseye, I think there are numerous weaknesses that enforcement and program managers should consider before making that case. We should be prepared for these push-backs should the case go forward. It's not my call (or OGC's) as to whether we proceed. The relevant policy offices can duke it out.

First, the positive factor. It is possible to say that, under an everyday use of the word "continuous," these furnaces operate continuously. They remain hot all the time, they are fed daily with raw materials for glass, and glass is pulled daily. I don't know of any other factors favoring saying the rule applies to Bullseye's furnaces.

The negatives are as follows, as I see it:

1) The continuous furnace exclusion was put into the rule based on a comment about "pot furnaces." 72 FR at 73186. That term, and the term "continuous furnace, has a meaning in the industry. We would not be following the common meaning in the industry. We explained the addition of "continuous furnace" to the applicability criteria as "we have revised § 63.11448 to specify that periodic or pot furnaces are not subject to the final Glass Manufacturing Area Source NESHAP. We believe this revision will address most of the concerns of the stained glass manufacturing sector as well as other sectors and organizations, such as artisans, schools, studios, and other small facilities that produce glass using periodic furnaces." The reference equating pot furnaces to periodic furnaces and contrasting them to continuous furnaces will likely be raised by Bullseye as explaining what we meant at the time we promulgated the rule. That is, they will argue we meant the common industry definition.

2) We agreed that our 112(k)(3) inventory (what we based the category listing on) reflected "relatively large manufacturing plants that operated continuous furnaces. Periodic furnaces were not included in the inventory." 72 FR at 73186. Again, we said we thought we were addressing "most of the concerns of the stained glass manufacturing sector" when we promulgated the definition. We will have to walk that back, perhaps on new knowledge of Bullseye's operation.

3) The background document for the proposal, "Characterization of the Glass Manufacturing Industry: Glass Manufacturing Area Source" does not include art glass shops and relatively small glassmaking facilities (page 5). We speculated these were likely not in TRI. It is not clear how Bullseye's operation fits in what we thought we were regulating. Note that this document does say we intended to regulate NAICS 327212, "other pressed and blown glassware," which includes "art, decorative, and novelty glass." It is possible stained glass plants like Bullseye's Portland operation are in that NAICS. However, on page 35 (as Susan has noted), we do not indicate any pressed and blown plants in Oregon, which is more consistent with thinking this source was not originally intended to be covered. I'll defer to the technical staff on how this document cuts.

4) The call log (page 2) shows Bullseye characterized their operation as involving "pot furnaces" and "periodic furnaces." The discussion in the preamble regarding our intent in the definition of "continuous furnace" (see 72 FR at 73186, discussed above) reflects these terms. They discuss "hand ladled batches" that take 8-14 hours to produce. It isn't clear how that differs from what we now know about the facility and the process. How does the feed and pull for these furnaces differ (or mirror) what goes on in a big furnace? Bullseye, Uroboros, and Spectrum do not operate pot furnaces for their main production capacity (I think bullseye might have one tiny one for experiments). Their production furnaces are called "day tanks." The raw materials are added over a period of 5-8 hrs, the batch cooks for 8 hours, then glass is ladled out for 6 hours and then the furnace is reheated to max temp to restart the process (it drops to close to 2000 when ladling). The only different between this and a big furnace is the way glass gets in and out. In a continuous furnace you add raw materials constantly and constantly "pull" glass out the back. You can have incredibly large "day tanks" and you can have small "continuous furnaces." The way raw materials are put in and out is not particularly relevant for emissions. In fact, most continuous furnaces are clear glass and the day tanks are used to melt colored glass because it is easier to shift color. Therefore, the only real difference between them is the fact that the "day tank" operations have higher toxic emissions when they are run regularly as these companies do.

5) I do not have in front of me any of the economics documents. Did we assume we were not picking up the relatively smaller shops? How many additional facilities would be brought in by going after Bullseye? Can we credibly distinguish Bullseye's operation from smaller facilities like college art departments? (I think perhaps yes if they are in the 4th NAICs code described in the background document). This is an issue for the policy offices. There are about 7 companies nationwide that are larger. Uroboros is pretty small and Spectrum is very large and Bullseye is somewhere in the middle. Uroboros, as the smallest, has national and international distribution. They are not equivalent to a college/university or even a glass blowing shop. This is a sophisticated company with a large distribution and diverse catalogue who produces a significant amount of glass. Everyone else is even bigger.

6) I'm guessing we did not get compliance notifications from any similar facilities when the NESHAP became effective. The preamble language may raise fair notice issues, and the lack of compliance notifications might be relevant. If there are logs of EPA regions or HQ fielding post-promulgation questions and saying, yes, you are exempt, then we would have further complications.

7) There may be physical barriers to the interpretation that periodic furnaces have to be shut down and restarted in order to be periodic. Cold starts and full stops may be so uncommon in the industry that relying on that as distinguishing Bullseye's operation as continuous may not be credible to a fact finder. I agree. At Spectrum I noticed that even their tiny experimental

crucibles (size of a large soup container) were kept hot at all times. Again these are used infrequently (or periodically) and I think that is the kind of thing I think we did mean to exclude. I agree that "hot" shouldn't be the only criteria used.

My personal, staff-attorney bottom line is that there are a number of factors that could make difficult developing this case as a NESHAP violation. I do not see many factors in the record that favor that interpretation. This does not preclude R10, OECA, or OAR from going forward based on the fact the furnaces are in some senses in continuous operation.

Jon Averback - Sr Attorney - EPA/OGC/ARLO - 202-564-1064

From: Throwe, Scott
Sent: Thursday, February 18, 2016 3:30 PM
To: Averback, Jonathan <Averback.Jonathan@epa.gov>
Cc: Narvaez, Madonna <Narvaez.Madonna@epa.gov>; McClintock, Katie <McClintock.Katie@epa.gov>; Fairchild, Susan <Fairchild.Susan@epa.gov>; Yellin, Patrick <Yellin.Patrick@epa.gov>
Subject: Region 10 glass facility issue
Importance: High

Jon:

As you probably know, we are dealing with an art glass facility in Region 10 which is releasing emissions of arsenic and cadmium in close proximity to a school. The facility is not currently subject to the area source rule for Glass Manufacturing (Part 63, Subpart 6S), but based on the applicability criteria we believe the rule should apply. The primary issue is whether the furnace is considered a "continuous furnace." We intentionally defined that term broadly in the rule. (See definition below)

Regions 10's concern is that the industry has their own understanding of what continuous furnaces are and would not necessarily consider this type of furnace "continuous."

We believe we on fairly strong ground regarding the applicability of Subpart 6S, but due to the potential for a legal challenge, we would like OGC's opinion.

Here is some of the key language in Subpart 6S

(a) This subpart applies to each existing or new affected glass melting furnace that is located at a glass manufacturing facility and satisfies the requirements specified in paragraphs (a)(1) through (3) of this section.

(1) The furnace is a continuous furnace, as defined in §63.11459.

Continuous furnace means a glass manufacturing furnace that operates continuously except during periods of maintenance, malfunction, control device installation, reconstruction, or rebuilding.

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